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IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fourth Amendment's objective reasonableness test, an arrest is deemed "reasonable" if there is probable cause to believe that a violation of law has occurred. Two judicial circuits find an arrest reasonable if, based on an objective assessment by a reasonable officer, there is probable cause to arrest for any offense. On the other hand, at least five judicial circuits find an arrest to be reasonable only if there is probable cause to arrest for crimes "closely related" to the crime or crimes articulated by the arresting officer. This case presents the following questions:

1. Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest?

2. For the purpose of qualified immunity, was the law clearly established when there was a split in the circuits regarding the application of the "closely related offense doctrine", the Ninth Circuit had no controlling authority applying the doctrine, and Washington state law did not apply the doctrine?

PARTIES

The parties to the proceeding below were:

Petitioners: Gerald Devenpeck, a Washington State Patrol Officer, Joi Haner, a Washington State Patrol Officer, and their marital communities. Petitioners were aligned as defendants/appellees below.

Respondent: Jerome Anthony Alford. Respondent was aligned as plaintiff/appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Gerald Devenpeck and Joi Haner, officers of the Washington State Patrol, and their marital communities, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 333 F.3d 972. App. 1a-22a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. App. 23a. The order of the United States District Court for the Western District of Washington granting in part and denying in part Defendants' Motion For Summary Judgment is also unpublished. App. 28a-41a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 23, 2003. App. 1a-22a. On August 8, 2003, the Court of Appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. App. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

Other relevant statutes are set out in the Appendix. These include the Privacy Act, prohibition against recording a private conversation, Wash. Rev. Code 9.73.030 (App. 66a-68a); the prohibition against impersonating a law enforcement officer, Wash. Rev. Code 9A.60.040(3) (App. 68a-69a); and, the prohibition against obstructing a law enforcement officer, Wash. Rev. Code 9A.76.020 (App. 69a).

STATEMENT

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The arrest of an individual constitutes a "seizure" of "persons". Consequently, an arrest is subject to the constitutional requirement that it not be "unreasonable". Generally, an arrest is reasonable if, based on an objective assessment of the fact and circumstances, a reasonable officer would conclude there is probable cause to believe that a violation of law has occurred.

This case concerns the scope of violations to which a court may look in assessing the existence of probable cause to arrest. A number of states, including Washington, and a number of judicial circuits allow courts to find probable cause for any violation objectively observable to a reasonable officer. Other states and judicial circuits, including the Ninth Circuit, in the present case, allow courts to find probable cause only for violations that are "closely related to and arising out of the same conduct" as the crime or crimes that the arresting

officer may have articulated at the time of the arrest. The question is whether the Fourth Amendment precludes a court from considering the existence of probable cause to arrest for violations that are not related to and do not arise out of the same conduct as that articulated by the officer at the time of the arrest.

1. Incident Giving Rise to Section 1983 Action

Respondent Jerome Alford brought Fourth Amendment based § 1983 claims and state law false arrest claims against two Washington State Troopers. The underlying facts involving Mr. Alford's arrest and those facts critical to the analysis here are largely undisputed. And as Judge Gould noted in his dissent to the opinion at issue here:

> "The officers whom the majority would tag with liability, despite an exculpatory jury verdict in the officers' favor, here stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least." App. 17a.

While on duty, Washington State Patrol Trooper Joi Haner observed Mr. Alford's vehicle stopped behind a disabled vehicle on the highway. As he was pulling in behind the stopped vehicles, Trooper Haner observed Alford quickly returning to his car. Alford told Haner that he had given the people in the car a flashlight to help them fix their flat tire. Alford then proceeded to his own car and drove off. Haner checked with the occupants of the stranded vehicle and learned that they believed

Alford was a police officer because his car had wig-wag headlights (headlights that flash on/off in an alternating manner).

Concerned that Alford was pretending to be a police officer, Trooper Haner proceeded after Alford and pulled him over. Upon stopping Alford, Haner observed that Alford had a police-band radio broadcasting Kitsap County Sheriff's Office communications (the same frequency Haner was using), had a microphone attached to the radio, a portable police scanner, and handcuffs. Haner also observed that Alford's license plate was nearly unreadable due to a colored license plate cover.

When asked by Haner to operate the wig-wag headlights, Alford claimed to be unable to get them to operate. Later, officers located a button on the instrument panel that easily activated the wig-wag lights. When Haner's supervisor, Sgt. Devenpeck arrived, he noticed a tape recorder on the passenger seat of Alford's car and determined that Alford had tape recorded conversations with the officers. Alford was then informed that he was under arrest for violation of Washington's Privacy Act (Wash. Rev. Code 9.73.030(1)(b)), which provides that, "[I]t shall be unlawful for any individual . . . to intercept or record any . . . private conversation, by any device electronic or otherwise . . . without first obtaining the consent of all persons engaged in the conversation." App. 66a-67a.

While Haner was transporting Alford to the jail, Sgt. Devenpeck was able to reach Deputy Prosecuting Attorney Mark Lindquist. Lindquist discussed with Devenpeck that there was probable

cause to arrest for obstructing an officer, impersonating an officer, as well as for a violation of the state Privacy Act.

The Privacy Act charge was the only charge ultimately filed against Alford. The charge was later dismissed based on an intermediate state appellate court decision that conversations between law enforcement officers and motorists on public highways are not "private" conversations for purposes of the Privacy Act. App. 9a-10a.

2. Procedural History

Respondent brought federal civil rights and state false arrest claims against the two Troopers and the Washington State Patrol in the United States District Court for the Western District of Washington at Tacoma. Petitioners moved for summary judgment arguing that the officers had probable cause to arrest Alford for the Privacy Act violation and that the officers were entitled to qualified immunity as a matter of law in any event.

The Federal district court determined that the Privacy Act did not apply based upon *Washington v. Flora*, 68 Wash. App. 802, 845 P.2d 1355 (1992), (recording an arrest made by public officers performing functions on a public thoroughfare near passersby did not violate the Act because the conversation was not private). Although the court concluded that the law was clearly established it found that issues of fact remained as to whether the officers acted reasonably. Nevertheless, the district court denied Petitioners' motion for summary judgment and allowed the case to go to a jury for a

determination of reasonableness for qualified immunity purposes. App. 28a-41a.

After four days of trial, a jury of six reached a verdict in favor of the Petitioners. The issue presented to the jury by way of the jury instructions was whether the Washington State Patrol and two of its Troopers had probable cause and/or acted reasonably in arresting the Respondent. App. 61a-64a. Alford objected to none of the jury instructions. Petitioners objected only to those instructions that found the law was clearly established. App. 47a-58a. Based on the facts and the instructions, the jury found in favor of Petitioners and against Respondent. App. 27a.

Respondent appealed the verdict to the Ninth Circuit Court of Appeals. A little more than two weeks prior to oral argument in this matter, the panel served upon the parties an order directing the parties to be prepared to discuss footnote 6, on page 1428, to *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied sub nom. Ball v. Gasho*, 515 U.S. 1144 (1995). App. 24a. In footnote 6 the court concluded that there was probable cause to arrest for an offense that was not charged because it was closely related to the offense that was charged. In dicta the court suggested that if the offenses were not closely related there would not be probable cause.

Approximately one month prior to the panel reaching its decision in *Alford*, a different three judge panel of the Ninth Circuit rendered its opinion in *Bingham v. City of Manhattan Beach*, 329 F.3d 723 (9th Cir. 2003) (*Bingham* I). In *Bingham* I the plaintiff was arrested for driving with an expired

license. But there was no probable cause for this arrest because it only applied if the driver was under the age of sixteen. Nevertheless, the panel concluded there was probable cause to arrest to verify an outstanding arrest warrant, which may have applied to the plaintiff—a basis completely unrelated to driving with an expired license. Petitioners believed this case was directly on point for the legal principles addressed therein and therefore cited *Bingham* I to the panel still considering *Alford*. App. 59a.

In reaching its decision, two members (Judges Browning and B. Fletcher) of a three judge panel ruled in favor of Respondent. The majority ruled that it was an abuse of discretion for the district court to deny respondent's motion for a new trial because there was no evidence to support the jury's verdict. The majority reasoned that there was no probable cause because "[t]ape recording officers conducting a traffic stop is not a crime in Washington." App. 9a. Petitioners argued that, "they had probable cause to arrest Alford for offenses other than tape recording, and therefore, Alford's rights were not violated". App. 10a. The majority rejected this argument based on the "closely related offense doctrine". According to the majority, "[p]robable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." App. 3a-4a. According to the majority "any impersonation charge would be based on Alford's use of wig-wag headlights [and an] obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights". App. 10a-11a. The majority concluded that these "offenses are not

closely related to the crime for which [petitioners] arrested [Alford] . . . tape recording a traffic stop". App. 11a. The majority also ruled that Petitioners were not entitled to qualified immunity. Even though a jury ruled in favor of Petitioners, the majority concluded that Petitioners did not make a reasonable mistake in arresting Alford for violating the Washington Privacy Act. App. 1a-22a.

Judge Gould filed a dissent largely focusing on the ample evidence that would support a finding that the officers acted reasonably and were entitled to qualified immunity. "The jury had plenty of evidence to conclude that the officers acted reasonably, as defined by the jury instructions to which Alford did not object." App. 22a.

Petitioners filed a petition for rehearing en banc inasmuch as there was substantial evidence to support a jury finding of reasonableness and because the Ninth Circuit's application of the "closely related offense doctrine" was in direct conflict with the Ninth Circuit's decision in *Bingham* I rendered just one month prior to the opinion in this case.

The Ninth Circuit denied Petitioners' petition for rehearing en banc on August 8, 2003. App. 23a. However, shortly thereafter, the panel in *Bingham I*, issued a corrected opinion that purportedly reconciled its holding there with the holding in *Alford*. *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003) (*Bingham* II).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three important reasons. First, there is significant conflict among the circuits as to whether probable cause may be found only in "closely related" offenses–arising out of the same conduct. Second, the "closely related offense" doctrine is inconsistent with the decisions of this Court. Third, the majority's opinion in *Alford* and the "closely related offense" doctrine it propounds will frustrate the administration of justice by encouraging law enforcement officers to "stack charges" in order to assure the existence of probable cause and to avoid potential liability.

1. There Is A Significant Conflict Among The Circuits Regarding The Applicability Of The "Closely Related Offense" Doctrine

There is a continuing conflict between the various federal circuit courts of appeals on the issue of which crimes will support the existence of probable cause to arrest—only crimes "closely related" to the crime announced by the officer at the time of the arrest or any crime supported by the facts and circumstances then known to the officer at the time of the arrest.

The Eleventh and D.C. Circuit Courts of Appeal have found that, since they do not determine probable cause from a subjective standpoint, probable cause for "any crime" is sufficient. *Lee v. Ferarro*, 284 F.3d 1188, 1195 (11th Cir. 2002) (neither subjective reliance on offense for which no probable cause exists nor verbal announcement of the wrong offense vitiates the arrest); *United States*

v. Bookhardt, 277 F.3d 558 (D.C. Cir. 2002) (in a suppression case, the defendant was arrested for an expired license but the officer used facts showing probable cause to arrest for reckless driving to justify the arrest).

Bookhardt involved facts very similar to the present case. There the arresting officers mistakenly believed that driving with an expired license was a crime. Because, however, the license had only been expired for less than ninety days, the offense was an infraction, not a crime. Finding that probable cause existed for other offenses, however, the Court recognized:

> "Other circuits have similarly concluded that, even if probable cause does not support arrest for the offense charged by the arresting officer, an arrest (and search incident thereto) is nonetheless valid if the same officer had probable cause to arrest the defendant for another offense. This result is consistent with the Supreme Court's holding in *Whren v. United States*, that the existence of probable cause must be determined objectively from the facts and circumstances known to the officer at the time of arrest without regard to the 'actual motivations' or '[s]ubjective intentions' of the officers involved. 517 U.S. 806, 813 (1996)." *Bookhardt*, 279 F.3d at 565 (footnote omitted).

On the other hand, the Fifth, Sixth, Seventh, Eighth, and Ninth Circuit Courts of Appeal have adopted the principle that the announced crime need not be the only basis on which the arrest is

justified. These courts hold, however, that the crime used to justify the arrest must be "closely related" to the crime identified at the time of the arrest.[1] *Vance v. Nunnery*, 137 F.3d 270, 273-77 (5th Cir. 1998) (applying "closely related offense" doctrine to defeat defense of qualified immunity); *Avery v. King*, 110 F.3d 12 (6th Cir. 1997) (even where there is no probable cause to arrest the plaintiff for the crime charged, proof of probable cause to arrest the plaintiff for a related offense is also a defense which may entitle the arresting officer to qualified immunity); *Biddle v. Martin*, 992 F.2d 673 (7th Cir. 1993) (in § 1983 actions for false arrest, probable cause need not have existed for the charge for which the plaintiff was arrested, so long as probable cause existed for arrest on a closely related charge); *United States v. Rambo*, 789 F.2d 1289 (8th Cir. 1986) (it is immaterial that at the time of the entry and arrest the officers did not have in mind the specific charge upon which the arrest can be justified: the offenses need only be closely related, and probable cause to arrest the defendant on the appropriate charge must have been present at the time); *United States v. Kalter*, 5 F.3d 1166, 1168 (8th Cir. 1993) (upholding arrest because although the police lacked probable cause to arrest the defendant for violation of the

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[1] In the First Circuit the court has applied the closely related doctrine in some cases and ignored it in others. *Cf., United States v. Lee*, 317 F.3d 26, 33 n.2 (1st Cir. 2003), *cert. denied sub nom. Ngai Man Lee v. United States*, 123 S. Ct. 2112 (2003) (arrest upheld for receiving stolen goods based on probable cause on credit card fraud charge); *Sheehy v. Town of Plymouth*, 191 F.3d 15, 19-20 (1st Cir. 1999) (applying "closely related offense doctrine" to avoid extrapolation of offenses in an effort to justify a sham arrest).

concealed weapon statute that was the actual reason for the arrest, they had probable cause to arrest him for violating a separate ordinance requiring that a gun be carried in a locked container).[2]

2. The "Closely Related Offense Doctrine" Is Itself Inconsistent With The "Objective Reasonableness Test" And The Decisions Of This Court

In analyzing Fourth Amendment claims of unlawful search and seizure, this Court has applied an "objective reasonableness" test. Under that test the focus is on the objective facts and circumstances known to the officer at the time of arrest. *Beck v. Ohio,* 379 U.S. 89 (1964). *See Illinois v. Gates,* 462 U.S. 213 (1983) (applying a totality of circumstances analysis to probable cause determinations). *Accord Alabama v. White,* 496 U.S. 325, 328-29 (1990). The law enforcement officer's subjective beliefs or motive for making an arrest plays no role in the Fourth Amendment analysis. *Arkansas v. Sullivan,* 532 U.S. 769 (2001); *Whren v. United States,* 517 U.S. 806 (1996). *See also United States v. Robinson,* 414 U.S. 218 (1973).

In *Scott v. United States,* 436 U.S. 128 (1978), the Court rejected the contention that wiretap evidence should be excluded based on the subjective

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[2] *See Driebel v. City of Milwaukee,* 298 F.3d 622, 644 (7th Cir. 2002); *United States v. Martinez,* 465 F.2d 79, 81 (2d Cir. 1972) (*per curiam*). For a compilation of cases, both state and federal, demonstrating the lack of uniform application of the closely related offense doctrine, see 1 Wayne R. La Fave, Criminal Practice Series, *Search and Seizure, Criminal Procedure* § 1.4 n.28 (3d ed. 1996 & Supp. 2004).

intent of the officer. The Court held that, "[t]he fact that the officer did not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action, does not invalidate the action taken as long as the circumstances viewed objectively, justify that action." *Scott,* 436 U.S. at 138.[3]

The "closely related offense doctrine" and the Ninth Circuit's application of it in this case, is not an objective analysis of the facts known to the officer. The "closely related offense doctrine" instead keys on the subjective belief of the officer as to which crimes probable cause exists, and/or those crimes that the officer may choose to articulate at the time of arrest. Following the holdings in *Sullivan* and *Whren,* even if an arrest is a sham, no Fourth Amendment violation occurs if probable cause existed for a crime cited by the officer.

In contrast, under *Alford* and the other Circuits that apply the so called "closely related offense doctrine", even if an arrest is not a sham and the officer has knowledge of facts supporting probable cause, there is a violation of the Fourth Amendment if the crime for which probable cause exists does not arise from the same conduct as the crime identified by the officer at the time of arrest. The "closely related offense doctrine" forgives an

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[3] The leading commentator in the area of criminal procedure has advocated that the holding in *Scott* should be defined to make it clear that, "[i]n all circumstances Fourth Amendment suppression issues are to be resolved without assaying 'the underlying intent or motivation of the officers involved'". 1 Wayne R. La Fave, Criminal Practice Series, *Search and Seizure* § 1.4(a) (3d ed. 1996).

officer's mistaken belief about the existence of probable cause only if probable cause exists for another crime related to and arising out of the same conduct as the crime identified at the time of arrest. But if the crimes for which probable cause exists involves different facts from the crime cited at the time of arrest, a court must ignore the existence of probable cause for those crimes, declare the arrest unlawful, and subject the officer to civil rights liability. [4]

In the present case, the law enforcement officers discussed with a deputy prosecutor the existence of probable cause to arrest, not only the Privacy Act Violation (tape recording), but also impersonating a law enforcement officer and obstructing a law enforcement officer. *Alford's* application of the "closely related offense doctrine", however, precludes consideration of the objective facts and circumstances which were clearly known to the officers at the time of arrest. The majority opinion in *Alford* refused to consider the existence of probable cause on the impersonation and obstruction

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[4] The dissenting opinion correctly notes that Alford's arrest was not a sham.

> "The officers did not arrest Alford on a rogue mission, nor motivated by malice nor on a whim; instead, they provided an example of how responsible and fair-minded officers should proceed deliberately when unfamiliar with the law a person is or may be violating; the officers called the prosecuting attorney, told him the facts, and read the statute to him. Even the prosecuting attorney mistakenly believed that the Privacy Act outlawed the covert tape recording by Alford of the officers' investigatory stop." App. 18a.

charges because they were unrelated to the tape recording which was the basis for the Privacy Act claim. Specifically the court held:

> "The conduct underlying the crimes suggested by the defendants is unrelated to Alford's tape recording. Any impersonation charge would be based on Alford's use of wig-wag headlights. An obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights assuming he knew how to do so. These offenses are not closely related to the crime for which defendants arrested Alford, nor was the conduct required for impersonation and obstruction similar to the conduct for which Alford was arrested: tape recording a traffic stop. Since the defendants did not have probable cause to arrest Alford for a violation of the Washington Privacy Act, probable cause to arrest for other unrelated offenses, if present, does not cure the lack of probable cause here. *Gasho,* 39 F.3d at 1428 n.6." App. 10a-11a. [5]

The focus of the "closely related offense doctrine" on the arresting officer's subjective belief as to the offense for which probable cause existed is irreconcilable with this Court's decision in *Florida*

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[5] As Judge Gould correctly noted in his dissenting opinion in *Alford*, since the District Court had permitted the case to go to the jury and the jury had found no liability on the Respondent's claims against Sergeant Devenpeck and Trooper Haner, the evidence was to be viewed in the light most favorable to the officers. App. 19a-20a.

v. Royer, 460 U.S. 491 (1983). In *Royer*, this Court held that if the objective probable cause test is met, it is not necessary to establish that the particular officer making the arrest or search subjectively believed that probable cause was present. This Court observed, "[t]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry* stop rationale would not foreclose the state from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search". *Royer*, 460 U.S. at 507 (citing *Peters v. New York, decided with Sibron v. New York*, 392 U.S. 40, 66-67 (1968)).[6]

The "closely related offense doctrine" is irreconcilably in conflict with *Royer* and its progeny. The synthesis of these two concepts would yield a rule that if law enforcement agents do not think they have probable cause, but they actually do, an arrest is upheld; but if they actually believe they have probable cause, and in fact do, but it is for a different crime, the arrest is invalid.

Such a rule suffers from a lack of defining principle, especially on the facts in this case, where Alford's *Terry* stop was based on the crime of impersonating a law enforcement officer. Contrary to this Court's Fourth Amendment jurisprudence,

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[6] *United States v. Roy*, 869 F.2d 1427 (11th Cir. 1989); *United States v. Moses*, 796 F.2d 281 (9th Cir. 1986) (fact that officer did not believe probable cause to arrest existed before search did not preclude finding that law enforcement agents had probable cause and therefore search incident to arrest was proper).

objective facts are ignored and the lynchpin of the analysis is a mistaken, subjective belief that probable cause exists for an offense that is unrelated to the crimes for which probable cause actually does exist.

An officers' motives, subjective beliefs and/or decision to articulate only one of many possible crimes as the basis for an arrest, should not be a factor in determining the lawfulness of the arrest under the Fourth Amendment. *Arkansas v. Sullivan*, 532 U.S. 796 (2001); *Whren v. United States*, 517 U.S. 806 (1995). If probable cause actually and objectively exists, an officer's mistaken belief about its existence for the wrong offense is no more violative of the Fourth Amendment than a mistaken belief that it does not exist at all. *See Royer*, 460 U.S. at 507.

3. The Ninth Circuit's Application Of The "Closely Related Offense Doctrine" Is In Conflict With Decisions Of Washington State Courts

In determining the validity of an arrest, Washington State courts apply an objective test and, consistent with this Court's prior directives, they look to the facts and circumstances known to the officer. Just as an arrest not supported by probable cause will not be recognized as lawful based on the officer's subjective belief that an offense has been committed, an arrest that is supported by a probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists. *See Washington v. Vangen*, 72 Wash. 2d 548,

433 P.2d 691 (1967); *Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied*, 119 Wash. 2d 1007 (1992); *City of Seattle v. Cadigan*, 55 Wash. App. 30, 776 P.2d 727, *review denied*, 113 Wash. 2d 1025 (1989); *Washington v. Stebbins*, 47 Wash. App. 482, 735 P.2d 1353, *review denied*, 108 Wash. 2d 1026 (1987).[7] *See also Washington v. Greene*, 75 Wash. 2d 519, 521, 451 P.2d 926, 928 (1969) ("property seized incident to a lawful arrest may be used in the prosecution of a suspected person for a crime other than the one for which he was arrested").

4. The Majority's Opinion In *Alford* And The "Closely Related Offense" Doctrine It Propounds Will Frustrate The Administration Of Justice By Encouraging Law Enforcement Officers To "Stack Charges" In Order To Assure The Existence Of Probable Cause And To Avoid Potential Liability

Although several circuits have adopted varying degrees of an unrelated offense rule, the underlying justification is to preclude an "ex post facto" sham justification for an arrest. Tracing the authority for Federal circuit court decisions which have adopted some form of an unrelated offense rule goes back to precedent which precedes and has been undermined by this Court's clear holdings in *Whren*, *Royer*, and *Sullivan* that an arresting officer's

[7] Although *Huff* was cited to the Ninth Circuit initially, the *Alford* decision did not acknowledge, either in its Fourth Amendment or qualified immunity analysis, that its application of the closely related offense doctrine was in conflict with the clearly established law of the State of Washington.

subjective motives or mistaken beliefs underlying an arrest are not part of the objective determination of probable cause. That determination is based on objective reasonableness taking into consideration the totality of facts and circumstances known by the officer at the time of arrest.

At trial in this case, when Sergeant Devenpeck was asked about other possible charges, he indicated that he had discussed obstructing a public servant with the deputy prosecutor, Mr. Lindquist, but said "the State Patrol doesn't stack charges, which they don't". App. 43a. As examples, Sergeant Devenpeck indicated:

> "If you stop an alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that is why you stopped them and you see they are intoxicated, you don't normally write them a ticket for the stop sign violation[.]" App. 43a.

Typically, within the criminal justice system, the initial on-the-spot decision by a police officer of what charge to cite for an arrest is reviewed pre-filing by law enforcement supervisors or, as occurred in this case, by a deputy prosecutor. *See*, 1 Wayne R. La Fave, Criminal Practice Series, *Criminal Procedure, The Decision to Charge* § 1.3(8) step 6 (3d ed. 1996). Prosecutors often exercise their discretion to lower charges based on a determination that the penalty for the higher charge is too severe for the nature of the crime or additional process costs involved in the proceeding are not justified. *Id.*

One of the primary problems in applying a "closely related offense doctrine" is that it usurps the prosecutorial function by concentrating the probable cause analysis on the initial, often hurried, on-scene charging decision by law enforcement and not on the pre-, or even post-, filing review by a prosecuting attorney. Then, comporting with the balancing of interests recognized in *Gerstein v. Pugh*, 420 U.S. 103 (1975), an arrestee can be brought before a neutral and detached magistrate for an objective determination, based on the totality of facts and circumstances known to the arresting officers, whether probable cause exists.[8]

Enforcement of the "closely related offense doctrine", either through the suppression of evidence, or through § 1983 civil rights liability, would encourage, if not require, law enforcement officers to "stack" charges at the time of the initial arrest. Operationally, this might cause the unfortunate consequence of higher bail and longer pre-arraignment and pretrial detention of criminal suspects.[9]

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[8] The problem which occurred in this case was that the prosecuting attorney, Mr. Lindquist, with whom Sergeant Devenpeck spoke, was unaware of the decision in *Washington v. Flora*, 68 Wash. App. 802, 845 P.2d 1355 (1992), and therefore did not modify the charge to impersonating and/or obstructing a law enforcement officer, for which probable cause clearly existed.

[9] *See generally United States v. Atkinson*, 450 F.2d 835 (5th Cir. 1971). The court noted that validating an arrest based upon crimes which were not in some fashion related,

> "[w]ould force police officers to routinely charge every citizen taken into custody with every offense they thought they could be held for in order to increase the chances that at least one charge would survive the test of probable cause. Such a clogging of the criminal process already heavily encumbered, would be pointless."

Atkinson, 450 F.2d at 838.

5. The Ninth Circuit's Application Of The "Closely Related Offense Doctrine" Is In Conflict With Decisions Of This Court Applying An Objective Reasonableness Test On The Issue Of Qualified Immunity

As this court held in *Saucier v. Katz*, 533 U.S. 194, 202 (2001): "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." The Ninth Circuit has struggled in applying this standard. In *Hunter v. Bryant*, 502 U.S. 224 (1991), this Court reversed the Ninth Circuit's holding that qualified immunity is a question of fact for the jury. Currently pending on certiorari before this Court is another case involving the Ninth Circuit's application of qualified immunity. *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), *cert granted*, 123 S. Ct. 1354 (2003). In *Ramirez* the Ninth Circuit concluded that the law was clearly established in absence of either binding authority from this Court or the Court of Appeals. This is a similar case. Prior to the Ninth Circuit's announcement of the closely related offense/same conduct test here, the courts in Washington State clearly indicated that probable cause to arrest for

any offense was sufficient in this state. In *Huff*, the state court of appeals found:

> "[The officer's] subjective intent to arrest [the defendant] for obstructing a public servant is immaterial. Assuming without holding that he could not lawfully have arrested her on that basis, the arrest here was nevertheless valid because he had objectively sufficient probable cause to believe that she was in possession of a controlled substance." *Huff*, 826 P.2d at 702.

Thus, prior to the Ninth Circuit's opinion in *Alford*, the law was not clearly established that an officer could not use the existence of probable cause for any crime to justify his or her arrest of a suspect.

To be sure, the Ninth Circuit had previously held that when the law is not clearly established by binding federal precedent, the court would consider the State's cases to make such a determination in qualified immunity cases. *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1111-13 (9th Cir. 1988) ("Absent binding precedent, we look at 'all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established.'"). Somehow, the Ninth Circuit in *Alford* rejected this approach and did not even discuss the holding in *Huff* when it denied the officers qualified immunity and reversed the jury's verdict in favor of the police officers.

Even the Ninth Circuit's application of the "closely related offense doctrine" has been

inconsistent. In *Bingham* II, the Court did not apply the "closely related offense doctrine" despite the fact that the unrelated justification for the arrest, an outstanding 1977 warrant, was clearly unrelated to any events that occurred at the time of the arrest. *Bingham* II, 341 F.3d at 951.[10]

In *United States v. Patzer*, 284 F.3d 1043, 1045 n.4 (9th Cir. 2001), the Ninth Circuit cited *Bookhardt* for the proposition that "an arrest is . . . valid if the same officer had probable cause to arrest the defendant for another offense". Contrary to the assertion of the *Alford* majority, *Gasho*, 39 F.3d at 1428 n.6, was not controlling authority. App. 13a. *Gasho*'s discussion of the "closely related offense doctrine", in a footnote, was *dicta* because the offenses in that case were determined by the court to be related and therefore the issue was not before the court.

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[10] The dissent in *Bingham* II observed:

> "In *Alford* we held that even though more than one offense occurred during the same encounter with the police the offenses were in fact unrelated and, accordingly, probable cause for an arrest on one could not be used to justify the arrest on another. Perhaps the majority's new rule is that, while an officer may not rely on unrelated offenses that are close in time, they may rely on unrelated offenses that occur decades apart. I simply do not comprehend the logic of this argument. . . . The new rule the majority adopts – the distantly unrelated offense doctrine—appears to be that the less related the offenses, the more likely the alternate justification for the arrest to be upheld." *Bingham* II, 341 F.3d at 955 (Rhinehart, J., dissenting).

The court also summarily dismissed the defendants' citation to *United States v. Saunders*, 476 F.2d 5, 6-7 (5th Cir. 1973), which applied the same Fourth Amendment interpretation as *Huff*. Referring to *Saunders*, the Ninth Circuit stated: "Whatever the rule may have been in that Circuit, this is not the test applied in the Ninth Circuit." App. 10a. This conflict in the Ninth Circuit and among the other federal courts of appeals surely does not make the law "clearly established" and makes it even less so after the decisions here in *Alford* and *Bingham* II. As already noted, there was a split in the Circuit Courts of Appeal and one of the leading commentators in the area of criminal procedure rejects any Fourth Amendment analysis which would focus on the intent or motivation of the officers involved. *See supra* note 3.

The Ninth Circuit erroneously concluded that its application of the "closely related offense doctrine" was consistent with the qualified immunity objective reasonableness test. The Court stated:

> "Even if we were not compelled by our precedent to consider only whether probable cause may have existed for closely related offenses based on the same conduct for which Alford was arrested, to hold otherwise would improperly turn the objective reasonableness inquiry into the officers' subjective motivations or beliefs at the time of arrest." App. 13a n.2.

A proper application of the objective reasonableness standard, however, does not require courts to ignore knowledge of facts and circumstances which were

within the possession of an arresting officer at the time of arrest.

Proper application of "closely related offense doctrine" in the context of a qualified immunity analysis does not require the court to view the evidence with judicial blinders precluding consideration of any objective facts supporting probable cause which does not arise from the same conduct as the crime cited by the arresting officer. In the case at bar, Sergeant Devenpeck and Trooper Haner were not only aware of the facts supporting an arrest for impersonating or obstructing a law enforcement officer, they did a *Terry* stop on Mr. Alford based upon reasonable suspicion that he was impersonating a law enforcement officer and spoke with the deputy prosecutor about probable cause for those offenses while they were transporting Mr. Alford to jail.

The Ninth Circuit also misapplied the qualified immunity analysis in reversing the jury's determination that the officers' mistaken belief that they had probable cause to arrest for the Privacy Act was reasonable. As Judge Gould's dissent correctly points out, the jury also had plenty of evidence to conclude that the officers acted reasonably in arresting Alford on the Privacy Act charge.

> "While in the field, the officers read the statute, which literally gives support to their arrest of Alford and does not on its face carve out an exception for taping law enforcement officers. Then, with a caution apparently reflecting their concern that they do the right thing, the officers contacted a prosecuting

> attorney to make sure that Alford's conduct indeed violated the Privacy Act. . . . Even the prosecuting attorney mistakenly believed that the Privacy Act outlawed the covert tape recording by Alford of the officers' investigatory stop. The officers were not unreasonable in trusting the advice of their prosecuting attorney." App. 17a-18a (footnote omitted).[11]

A proper application of the objective reasonableness standard, under both the Fourth Amendment and the qualified immunity analysis, requires a court to consider all facts and circumstances in the possession of the officers at the time of the arrest. To the contrary, the "closely related offense doctrine" prohibits a court from considering all of the facts surrounding an arrest. Given the widespread utilization of this improper Fourth Amendment and qualified immunity standard, the Circuit courts which apply a related offense rule need to be corrected and instructed to consider all facts under the objective reasonableness

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[11] Although the Petitioner's believe that under *Hunter* this was an issue of law for the court to decide, and accordingly moved for summary judgment on the issue of qualified immunity, the district court sent the issue to the jury pursuant to Ninth Circuit practice. *See* Ninth Circuit Model Civil Jury Instructions 11.3, Qualified Immunity (comment); App. 65a.

The jury returned a general verdict in favor of the defendant law enforcement officers on either the existence of probable cause or qualified immunity, which issues were presented to them by the court's jury instructions.

standard in accordance with this Court's cases cited above.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 01-35141

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

JEROME ANTHONY ALFORD,

Plaintiff-Appellant,

v.

JOI HANER, a Washington State Patrol Officer; JANE DOE HANER, his wife;

GERALD DEVENPECK, SGT., Washington State Patrol; JANE DOE DEVENPECK, his wife,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington

Robert J. Bryan, District Judge, Presiding

Argued and Submitted
June 14, 2002 – Seattle, Washington
Filed June 23, 2003

Before: James R. Browning, Betty B. Fletcher, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Browning;

Dissent by Judge Gould

SUMMARY

Government Law/Immunity

The court of appeals reversed a judgment of the district court. The court held that no objectively reasonable officer could conclude that arresting a person for tape recording a traffic stop on a public thoroughfare is permissible under the Washington Privacy Act.

Appellant Tony Alford spent the night in jail for tape recording a traffic stop conducted on the shoulder of a highway by appellees Joi Haner, a Washington State Trooper, and his supervisor, Sergeant Devenpeck. The officers were concerned that Alford was pretending to be a police officer and engaging in obstruction. Alford told the officers that he had a copy of a Washington state court opinion in his glove compartment that held that the Washington Privacy Act does not apply to police officers performing official duties. The officers did not look at the case, although they had read the Privacy Act before arresting Alford. Devenpeck related what had occurred to prosecutor Mark Lindquist, but did not tell him about the case Alford had cited. Lindquist advised Devenpeck that there was clearly probable cause for arrest. Since taping police officers during the performance of their public duties was not illegal under the Washington Privacy Act, the charge was dismissed by a state court.

Alford filed suit in federal district court under 42 U.S.C. § 1983, alleging that his arrest, incarceration, and prosecution violated his Fourth

Amendment right to be free from unreasonable seizure, and pursued state law claims for unlawful arrest and imprisonment. The officers claimed they were entitled to qualified immunity and had probable cause for the arrest. Devenpeck testified that at the time of the arrest, his belief that he had probable cause to arrest Alford was based solely on his view that Alford had violated the Privacy Act. Haner admitted that the case Alford cited had previously been mentioned in a law enforcement digest that Haner generally read. Lindquist testified that his probable cause determination was based primarily on conduct other than the tape recording. The jury was instructed that state law clearly established at the time of the incident did not bar the type of recording for which Alford was arrested. Nevertheless, the jury found for the officers and the district court denied Alford's motion for a new trial.

Alford appealed.

The elements of a § 1983 action are: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. There was no dispute about the first element: the officers acted under color of state law.

As to the second element, the Fourth Amendment prohibits arrests without probable cause. Probable cause exists when an officer has a reasonable belief that a crime has been, is being, or is about to be committed. Probable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it

involves the same conduct for which the suspect was arrested. The conduct underlying the crimes suggested by the officers were not closely related to the crime for which officers arrested Alford, nor was the conduct required for impersonation and obstruction similar to the conduct for which Alford was arrested: tape recording a traffic stop. Since the officers did not have probable cause to arrest Alford for a violation of the Washington Privacy Act, probable cause to arrest for other unrelated offenses, if present, did not cure the lack of probable cause.

The first question under the two-part inquiry for determining whether the officers are entitled to qualified immunity is whether the law governing the official's conduct was clearly established. The officers had to show they could have reasonably believed that their actions were lawful, that is, under the facts presented the officers could have reasonably believed that there was probable cause to arrest Alford for a violation of the Privacy Act (or a closely related offense). The plain language of the Privacy Act, which the officers read before arresting Alford, prohibits only the recording of a private conversation, and the law was clearly established that a traffic stop was not a private encounter. The taping was legal. Under the facts presented, viewed in the light most favorable to the officers, no reasonable officer could think that Alford had recorded a private conversation in violation of the Washington Privacy Act. The officers not only failed to read the clear language of statute and incorrectly decided that the traffic stop on a public thoroughfare was a private conversation, they also declined to read the case Alford offered and did not call it to the attention of the prosecuting attorney. Because in

light of the facts and clearly established law no objectively reasonable officer could have concluded that arresting Alford for taping the traffic stop was permissible, officers were not entitled to immunity. The district court abused its discretion in not granting the motion for a new trial .The judgment of the district court had to be reversed.

Judge Gould dissented, writing that in light of the district court's submission of the case to a jury that in turn gave verdict of no liability, it is wrong for an appellate court majority to reverse the jury's decision on the incorrect theory that there is insufficient evidence to support the jury verdict.

COUNSEL

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Christine O. Gregoire, Attorney General, Eric A. Mentzer, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

BROWNING, Circuit Judge:

Tony Alford spent the night in jail for tape recording a traffic stop. Since taping police officers during the performance of their public duties is not illegal under the Washington Privacy Act, the charge was dismissed by a state court.

Alford then filed suit under 42 U.S.C. § 1983 alleging that his arrest, incarceration and prosecution violated his Fourth Amendment right to be free from unreasonable seizure, and pursued state

law claims for unlawful arrest and imprisonment. Defendants claimed they were entitled to qualified immunity and had probable cause for the arrest. The jury was instructed that state law clearly established at the time of the incident did not bar the type of recording for which Alford was arrested. Nevertheless, the jury found for the defendants and the district court denied Alford's motion for a new trial. Alford appeals. We reverse and remand.

I. Facts & Procedural History

While driving to his night job, Alford noticed a disabled car on the shoulder of a highway. The area was dark and deserted and he pulled over to offer assistance. After helping the motorists jack up their car and giving them a flashlight to use, he began walking back to his car.

Defendant Joi Haner, a Washington State Trooper, driving in the opposite direction, had observed the disabled vehicle and Alford's car pulling in behind it. Haner turned around at the first opportunity.

When Haner arrived, he saw Alford walking back toward his own car. Alford told Haner that the people in the car had a flat tire and that he had given them a needed flashlight. Alford then drove off and Haner went to check on the occupants of the stranded vehicle.

The motorists told Haner that they believed Alford was a police officer, in part because his car had "wig-wag" headlights (headlights that flash alternately). Because Haner was concerned that Alford was pretending to be a police officer, he called his supervisor, Sergeant Devenpeck, and drove off in

pursuit of Alford. After pulling Alford over, Haner noticed that Alford's license plate was nearly unreadable because of a tinted license plate cover. Haner also saw that Alford had an amateur radio broadcasting the communications of the Kitsap County's Sheriff's Office, a microphone attached to the radio, a portable police scanner, and handcuffs.

Haner asked Alford about the wig-wag headlights and Alford responded that they were part of an alarm system that had been installed that day. Haner then ordered Alford to demonstrate the wig-wag lights, Alford pressed several buttons, but was unable to activate the lights. Haner noticed that Alford had not pushed a button near Alford's right knee, but did not ask Alford to do so. Later, another officer pushed the button and activated the wig-wag lights.

When Sergeant Devenpeck arrived he also asked Alford about the wig-wag lights. While talking with Alford, Devenpeck noticed a tape recorder on the passenger seat recording the traffic stop. Devenpeck told Haner to remove Alford from the car, and informed Alford that he was under arrest for making an illegal tape recording.

Alford told the officers that he had previously had a similar problem with the Kitsap County Sheriff and that he had a copy of a Washington Court of Appeals opinion in his glove compartment which held that the state Privacy Act does not apply to police officers performing official duties. The officers did not look at the case. Officer Devenpeck later testified that at the time of the arrest, his belief that he had probable cause to arrest Alford was

based solely on his view that Alford had violated the Privacy Act.

When Alford was on his way to jail, Devenpeck called Deputy Prosecuting Attorney Mark Lindquist. Devenpeck related what had occurred but did not tell Lindquist about the case Alford had cited. Lindquist advised Devenpeck that there was "clearly probable cause" for arrest, but at trial Lindquist testified that this determination was based primarily on conduct other than the tape recording. Officer Haner also later admitted that the case Alford cited had previously been mentioned in a law enforcement digest that Haner generally read.

Alford was jailed for the night on the charge of making an illegal audio recording of a private conversation without knowledge or consent. His car was towed and impounded. A state court judge later dismissed the charge.

Alford filed a complaint in federal district court against both the officers and the Washington State Patrol. The Patrol was later dismissed. Alford presented two claims to the jury, a § 1983 claim and a state law claim for unlawful arrest and imprisonment. The jury found for the defendants. The district court denied Alford's motion for a new trial.

II. Motion for a New Trial

We review a district court's ruling on a motion for a new trial for abuse of discretion. *U.S. v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). We will reverse the denial of a new trial where, as here, there is no evidence to support the jury's verdict. *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174,

1189-90 (9th Cir. 2002); *see also De Saracho v. Custom Food Mach. Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

The elements of a section 1983 action are: (1) that "the conduct complained of was committed by a person acting under color of state law;" and (2) that the "conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).[1] [There is no dispute about the first element: the defendants acted under color of state law.

As to the second element, Alford argues that he was deprived of his constitutional right to be free from unreasonable seizure. The Fourth Amendment prohibits arrests without probable cause. *See Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). Probable cause exists when an officer has "a reasonable belief . . . that a crime has been, is being, or is about to be committed." *Hopkins v. City of Sierra Vista*, 931 F.2d 524, 527 (9th Cir. 1991) (internal quotation marks omitted). Tape recording officers conducting a traffic stop is not a crime in Washington. *See* Wash. Rev. Code § 9.73.030(1)(b) (prohibiting recording of private conversations);

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[1] The elements of Alford's state law claim were similar. As stated in the jury instructions, Alford had to show that defendants (1) arrested Alford without probable cause; (2) acted under color of law; and (3) proximately caused Alford's injuries. Because these elements are so similar to the § 1983 claim, and we reach the same result for both his state and federal claims, we do not discuss them separately.

State v. Flora, 68 Wash. App. 802, 845 P.2d 1355 (1992) (finding that recording an arrest made by public officers performing functions on public thoroughfares did not violate Washington law because the arrest did not constitute a private conversation). Here, the jury was instructed that an arrest made without probable cause was unreasonable and that, under clearly established law, the conduct for which Alford was arrested was not a violation of the Privacy Act.

Since they did not have probable cause to arrest Alford for violating the Privacy Act, defendants now claim on appeal that they had probable cause to arrest Alford for offenses other than tape recording and therefore, Alford's rights were not violated. The defendants cite a 1973 Fifth Circuit case for the proposition that an arrest may be valid, even if there was not probable cause to arrest for the particular crime cited, if there was probable cause to arrest a person for *some* criminal offense. *United States v. Saunders*, 476 F.2d 5, 6-7 (5th Cir. 1973). Whatever the rule may have been in that Circuit, this is not the test applied in the Ninth Circuit. In this Circuit, "[p]robable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994) (emphasis added), *cert. denied sub. nom., Ball v. Gasho*, 515 U.S. 1144 (1995).

The conduct underlying the crimes suggested by the defendants is unrelated to Alford's tape recording. Any impersonation charge would be based on Alford's use of wig-wag headlights. An obstruction

charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights assuming he knew how to do so. These offenses are not closely related to the crime for which defendants arrested Alford, nor was the conduct required for impersonation and obstruction similar to the conduct for which Alford was arrested: tape recording a traffic stop. Since the defendants did not have probable cause to arrest Alford for a violation of the Washington Privacy Act, probable cause to arrest for other unrelated offenses, if present, does not cure the lack of probable cause here. *Gasho*, 39 F.3d at 1428 n.6.

The defendants argue that a reasonable officer would have believed Alford was violating the state privacy law and therefore they are entitled to qualified immunity. The first question under the two-part inquiry for determining whether the officers are entitled to qualified immunity is whether the "law governing the official's conduct [was] clearly established." *Act-Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). The plaintiff bears the burden of making this showing. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). For qualified immunity purposes, "the contours of the right must be sufficiently clear that at the time the allegedly unlawful act is [under]taken, a reasonable official would understand that what he is doing violates that right;" and "in the light of pre-existing law the unlawfulness must be apparent." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quotations omitted). Here, the jury was instructed that Washington law permitting the tape recording of a traffic stop was clearly established: "It is not a violation of the Washington Privacy Act to

tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not 'private' under the Privacy Act. This rule of law was clearly established by Washington Courts in 1992 in the case of *State of Washington v. Flora.*" Since Alford met his burden of showing that the law was clearly established, "the burden shift[ed] to the defendant[s] to show that a reasonable police officer could have believed, in light of the settled law, that he was not violating a constitutional right" by arresting Alford for illegal tape recording. *See Gasho,* 39 F.3d at 1438.

Under this "objective reasonableness" test, *Mendoza,* 27 F.3d at 1360, the officers' subjective intent or beliefs are essentially irrelevant; the proper inquiry is whether in light of the facts and circumstances confronting the officers, it was objectively reasonable to conclude that Alford's arrest for a violation of the Privacy Act was supported by probable cause. *See Anderson v. Creighton,* 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Mendoza* at 1362. While "[o]ur prior determination that the arrest[ ] lacked probable cause is not necessarily determinative," *Gasho* at 1439, the officers must still show "they could have reasonably believed that their actions were lawful," *id.,* that is, under the facts presented the officers could have reasonably believed that there was probable cause to arrest Alford for a violation of the Privacy Act (or a closely related offense). *See id.* at 1428 n.6, 1439.[2]

[2] We reject the officers' argument that they are entitled to qualified immunity if probable cause could have existed for other, unrelated offenses. As with our earlier determination that the arrest without probable cause violated Alford's rights, probable cause to arrest Alford for other unrelated offenses, if present, does not render his arrest lawful or objectively reasonable for the purpose of allowing the officers to invoke the shield of qualified immunity. *See Gasho* at 1428 n.6, 1439. Even if we were not compelled by our precedent to consider only whether probable cause may have existed for closely related offenses based on the same conduct for which Alford was arrested, to hold otherwise would improperly turn the objective reasonableness inquiry into an inquiry into the officers' subjective motivations or beliefs at the time of arrest. *See, e.g., Trejo v. Perez,* 693 F.2d 482, 486 (5th Cir. 1982) (finding requirement of "objective reasonableness" best vindicated by limiting the probable cause determination for qualified immunity purposes to "sufficiently related offenses" because this limitation incorporates an "objective [reasonableness] standard for avoiding after the fact extrapolation" that "obviates the need for a delicate subjective inquiry"). Because the "closely related offense" doctrine already accounts for the possibility of sham arrests or later extrapolated justifications, and correctly focuses on the objective reasonableness of an arrest, we cannot introduce a further inquiry into the officers' subjective beliefs or motivations at the time of the arrest. It would eviscerate the "objective reasonableness" standard, and the "closely related offense" doctrine, to allow the officers to invoke qualified immunity by claiming reliance on probable cause for other uncharged and unrelated offenses.

Defendants argue they reasonably believed what they were doing was lawful and other officers have thought that surreptitious recording of a traffic stop was illegal. But the defendants mistakenly define "reasonable," focusing on their good faith and subjective beliefs as to the legality of their conduct instead of whether it was objectively reasonable to arrest Alford for a violation of the Privacy Act.[3] The

[3] Similarly, the dissent emphasizes the officers' subjective beliefs about the scope of the law and their conduct rather than the objective reasonableness of their actions in light of the facts and clearly settled law. Since defendants have

facts presented show that Alford taped a traffic stop on a public thoroughfare. There is no dispute that when the taping occurred the officers were performing a public function. The plain language of the Privacy Act, which the defendants read before arresting Alford, prohibits only the recording of a private conversation, and the law was clearly established that a traffic stop was not a private encounter. The taping was legal. There was no evidence that *Flora* could be distinguished or that a reasonable officer could think that the arrest was a private conversation.[4] Devenpeck testified that he

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alleged no facts that would show that it was objectively reasonable to arrest Alford for violating the Privacy Act, their subjective beliefs are not sufficient to meet their burden under the qualified immunity standard. *See DeNieva v. Reyes*, 966 F.2d 480 (9th Cir. 1992) (finding defendant's assertions of good faith, without facts or law showing his actions were objectively reasonable, were not sufficient to show that a reasonable officer could have believed his conduct lawful).

[4] The dissent's suggestion that the statute "literally gives support" to the officer's arrest is not borne out by the text of the Privacy Act. The Act plainly prohibits only the recording of a "[p]rivate conversation, by any device electronic or otherwise . . . without first obtaining the consent of all the persons engaged in the conversation," Wash. Rev. Code § 9.73.030(1)(b). A plain reading of the Washington Privacy Act does not imply that a privacy interest is created when an officer stops an individual on a public thoroughfare for a traffic violation. In fact, such a view has been rejected as "wholly without merit." *Flora*, 845 P.2d at 1357. In finding that the officers in *Flora* "could not reasonably have considered their words private" while performing a public function on a public thoroughfare, *id.* at 1358, the *Flora* court did not, as the dissent suggests, "differ from express statutory language" of the Privacy Act or narrow the scope of the statute. On the contrary, the *Flora* court merely complied with the intent of the statute, which "reflects a desire to protect individuals from the disclosure of any secret illegally uncovered by law

arrested Alford because Alford had been *hiding* the tape recorder. But no reasonable officer would think that hiding the tape recorder would create a privacy interest for the officer. In fact, *Flora*, 845 P.2d at 1356, involved a hidden tape recorder. Under the facts presented, viewed in the light most favorable to the officers, no reasonable officer could think that Alford had recorded a private conversation in violation of the Washington Privacy Act. *See id.* at 1358 (finding that police officers performing a public function on a public thoroughfare "could not reasonably have considered their words private").

Nevertheless, the defendants argue that they made a reasonable mistake of law and therefore are entitled to qualified immunity under *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). In *Katz*, the Supreme Court held that officers who make "reasonable mistakes as to the legality of their actions" can invoke qualified immunity. *Id.* at 206. Although *Katz* was a case involving excessive force, the Court made it clear that the same rationale would apply to an officer's probable cause determination. *Id.* However, *Katz* was based on the idea that police officers will sometimes have difficulty drawing fine legal distinctions under exigent circumstances. *See id.* at 205-06.

The legal distinction the officers were asked to make here was not a difficult one: taping private conversations is illegal, taping a traffic stop is not.

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enforcement," *State v. Fjermestad*, 114 Wash. 2d 828, 791 P.2d 897, 902 (1990), and declined the state's invitation "to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity." *Flora* at 1358.

Furthermore, this is not a case of exigent circumstances. Alford was in his car with a tape recorder, the officers read the applicable statute, and Alford even offered the officers a copy of the relevant case which he had in his glove compartment. The officers not only failed to read the clear language of statute and incorrectly decided that the traffic stop on a public thoroughfare was a private conversation, they also declined to read the case Alford offered and did not call it to the attention of the prosecuting attorney. *Katz* is intended to apply with regard to an officer's exercise of discretion rather than his or her faulty grasp of or memory about what the law is. *See id.* at 205-06. Because in light of the facts and clearly established law no objectively reasonable officer could have concluded that arresting Alford for taping the traffic stop was permissible, defendants were not entitled to immunity.

III. Conclusion

Defendants arrested Alford for tape recording a public conversation, but the law clearly prohibits only the recording of private conversations. Probable cause to arrest for other crimes does not cure the defendants' violation of Alford's rights. *Gasho,* 39 F.3d at 1428 n.6.

The facts and the law clearly established that the traffic stop was public. There was no evidence that Alford had violated the Privacy Act or that the encounter was private. No objectively reasonable officer could have concluded that taping an officer during a traffic stop on a public thoroughfare was barred by the Privacy Act.

We conclude that on the evidence presented, viewed in the light most favorable to defendants, it

was not possible to rule for the defendants. The district court abused its discretion in not granting the motion for a new trial. We reverse and remand to the district court for further proceedings consistent with this decision.

REVERSED AND REMANDED.

GOULD, Circuit Judge, dissenting:

I respectfully dissent, believing that the determination of reasonableness is in the province of the jury. Indeed, I cannot help but think that Congress would shudder to see 42 U.S.C. § 1983 interpreted here to provide for liability and for the potential of a monetary remedy against the law enforcement officers, here state troopers, who quite obviously were doing their job to protect the public.

The officers whom the majority would tag with liability, despite an exculpatory jury verdict in the officers' favor, here stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least. After stopping and questioning Alford, following his abrupt departure from the vicinity of a stalled motorist who had been led by Alford's flashing vehicle lights to believe Alford was a police officer, the real officers arrested Alford in good faith, with their judgment seconded by a public prosecutor who was consulted.

Officer Haner and Sergeant Devenpeck reasonably believed Alford's tape recording of the traffic stop was outlawed by the Washington Privacy Act. While in the field, the officers read the statute, which literally gives support to their arrest of Alford

and does not on its face carve out an exception for taping law enforcement officers.[1] Then, with a caution apparently reflecting their concern that they do the right thing, the officers contacted a prosecuting attorney to make sure that Alford's conduct indeed violated the Privacy Act. The officers did not arrest Alford on a rogue mission, nor motivated by malice, nor on a whim; instead, they provided an example of how a responsible and fair-minded officer should proceed deliberately when unfamiliar with the law a person is or may be violating; the officers called the prosecuting attorney, told him the facts, and read the statute to him. Even the prosecuting attorney mistakenly believed that the Privacy Act outlawed the covert tape recording by Alford of the officers' investigatory stop. The officers were not unreasonable in trusting the advice from their prosecuting attorney instead of relying on the assertions of Alford that case law to be found in his glove compartment exonerated him.

The majority argues that an officer, acting in good faith, could not reasonably believe that the text of the Privacy Act, on its face, supports an arrest

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[1] The pertinent portions of the Washington Privacy Act read:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

Rev. Code Wash. [sic] (ARCW) § 9.73.030(1)(b).

under these circumstances, because the statute prohibits the recording of "[p]rivate conversations." The conversation that Alford recorded took place on a lonely stretch of road, at night, with nobody present except for Alford and the two officers. From an objective point of view, it could be reasonable for a jury to conclude, when viewing the facts in the light most favorable to the government, that the officers who read the literal language of the statute, who were unaware of an intermediate appellate court precedent, and who received supportive advice from the city's prosecuting attorney, had a reasonable belief that Alford's conduct violated the Privacy Act. In common sense and common parlance, one might say that two officers talking to a suspect alone in an automobile at roadside on a secluded highway, with no one else present, were engaged in a "private conversation" that could invoke the Privacy Act. The crux of the issue is whether it is a reasonable mistake of law for officers not to abide by an interpretive appellate precedent of which they were not aware.

What is most troubling to me about this case is that the majority does not give adequate heed to the fact that the district court permitted this case to go to the jury, and the jury, given instructions to which Alford did not object and that are not at issue on appeal, found no liability. In light of the district court's submission of this case to a jury that in turn gave a verdict of no liability, it is wrong for an appellate court majority to reverse the jury's decision

on the incorrect theory that there is insufficient evidence to support the jury verdict.[2]

The evidence now is to be viewed in the light most favorable to the officers, as it must be after a favorable jury verdict and a motion for a new trial. There is no challenge to the jury instructions. The trial court determined that the Washington appellate court's 1992 decision in *Washington v. Flora* held that conversations with police officers are not "private" under the state Privacy Act, that this "rule of law was clearly established," and the district court so instructed the jury. Yet the jury still had the right to make a determination that the officers' conduct may have been reasonable if a reasonable mistake was made about the law.

The majority in substance slaps a strict liability theory on law enforcement officers who misunderstand the law of statutory interpretation. This is incorrect. The reason that the arrest turned out to be illegal here was that the broad literal text of the privacy statute had been interpreted restrictively by an intermediate state appellate court in an opinion that was not known by the officers or familiar to the prosecuting attorney.[3] It is

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[2] The majority's theory is also contrary to our precedent in *Thorsted v. Kelly*, 858 F.2d 571, 574-75 (9th Cir. 1988) ("although the . . . inquiry, whether legal rights have been settled, may often best be resolved by the trial judge, . . . the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact.") (citations omitted).

[3] The *Flora* opinion was rendered by the Washington intermediate Court of Appeals, Division I, whereas the officers here worked in Pierce County, within an area controlled by the Washington Court of Appeals, Division II, and *Flora* was not a

impractical and unjust to expect that in every case every law enforcement officer will know every legal decision written by every level of the state courts about every law. To be sure, officers may not reasonably be ignorant of well-established constitutional principles, such as the need for probable cause to arrest. But here, the officers were aware they needed probable cause to arrest. Their mistake was that they interpreted a state statute literally despite a state court ruling that had narrowed it.

The majority's strict liability rule oppresses law enforcement, and relies on an unworkable legal fiction that presumes police officers must be aware of all state court of appeals decisions bearing on law enforcement. In my view, it is not correct to assume that officers necessarily can become familiar with all appellate opinions that change the contours of the law to differ from express statutory language. *See Ganwich v. Knapp*, 319 F.3d 1115, 1125 (9th Cir. 2003) ("It may be argued that judges should not expect police officers to read *United States Reports* in their spare time, to study arcane constitutional law treatises, or to analyze Fourth Amendment developments with a law professor's precision. *We do not expect police officers to do those things.*") (emphasis added). To attach per se liability on that theory cannot be justified by the intent of Congress in passing civil rights laws or by the Supreme Court's established precedent, or ours, properly viewed. Reasonableness of government conduct is at the core of the inquiry on liability. And

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state supreme court case controlling all intermediate appellate courts.

reasonableness is a fact question for a jury. The officers here, who read a statute before making an arrest, saw it literally covered the challenged conduct, and double-checked with a prosecuting attorney, were acting reasonably, even if it turned out the officers' belief about the law was incorrect.

The jury had plenty of evidence to conclude that the officers acted reasonably, as defined by the jury instructions to which Alford did not object. I would uphold the jury's verdict. I must respectfully dissent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Aug 08 2003
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JEROME ANTHONY ALFORD, Plaintiff – Appellant, v. JOI HANER, a Washington State Patrol Officer; et al., Defendants – Appellees.	No. 01-35141 D.C. No. CV-99-05586-RJB Western District of Washington, Tacoma ORDER

Before: BROWNING, B. FLETCHER, and GOULD, Circuit Judges

A majority of the panel has recommended against granting the petition for rehearing en banc. Judge Gould voted to grant the petition for rehearing en banc. Judge Browning and Judge B. Fletcher recommended against granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

FILED
MAY 28, 2003
CATHY A. CATTERSON
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME ANTHONY ALFORD, Plaintiff-Appellant, v. JOI HANER, a Washington State Patrol Officer, et al., Defendants-Appellees.	No. 01-35141 D.C. No. CV-99-05586-RJB Western District of Washington, Tacoma ORDER

At oral argument on June 14, 2002, counsel should be prepared to discuss the effect, if any, on this appeal of *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994).

FOR THE COURT:

CATHY A. CATTERSON
CLERK OF COURT

By: //s//
Rhonda Roberts
Deputy Clerk

FILED
Jan 10 2001
Clerk U.S. District Court
Western District of Washington at Tacoma

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. GERALD DEVENPECK, JOI HANER, et al., Defendants.	Case No. C99-5586RJB ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

THIS MATTER comes before the court on the above-referenced motion. The court has considered the records and files herein, plaintiff's motion, and the events of the trial. Response from the defendants is not necessary.

The court is satisfied that there was a legally sufficient evidentiary basis to support the jury's verdict for the defendants. Accordingly, the motion should be denied.

It is so **ORDERED.**

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of

record and to any party appearing *pro se* at said party's last known address.

DATED this 10th day of January, 2001.

//s//
ROBERT J. BRYAN
U. S. District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

JEROME ANTHONY ALFORD, v. JOI HANER and LISA HANER, his wife; and GERALD DEVENPECK and JANE DOE DEVENPECK, his wife,	JUDGMENT IN A CIVIL CASE Case Number: 99-5586RJB

[XX] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict as follows:

The jury finds FOR defendants and against the plaintiff.

FILED
Jan 05 2001
Clerk U.S. District Court
Western District of Washington at Tacoma

Jan. 5, 2001
Date

//s// [Bruce Rifkin]
Clerk

//s// [Jean Bering]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FILED
Nov 30 2000
Clerk U.S. District Court
Western District of Washington at Tacoma

JEROME ANTHONY ALFORD, Plaintiff, v. WASHINGTON STATE POLICE, JOI HANER, GERALD DEVENPECK, ANNETTE SANDBERG, CHRIESINE GREGOIRE, Defendant.	Case No. C99-5586RJB ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants Motion for Summary Judgment (Dkt. #35). The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

A. SUMMARY JUDGMENT STANDARD

Summary Judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R Civ. P. 56(c). The moving party is entitled to judgment as a matter

of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 S.242, 253 (1986); *T.W. Elec. Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service, Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service, Inc.*, 809 F.2d at 630 (relying on *Anderson*,

supra). Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed". *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. RELEVANT FACTS

On November 22, 1997, plaintiff had stopped to help a disabled vehicle on the shoulder of SR 16. He had given the stranded motorist a flashlight to use, and then continued on his way. State Patrol Trooper Joi Haner, who had noticed the disabled vehicle and had seen plaintiff's car pull in behind the disabled vehicle, turned around and pulled in behind plaintiff's car. As Haner got out of his car, plaintiff returned to his own car and left the scene. One of the individuals in the stranded car informed Officer Haner that the automobile that had stopped to assist them had "wig-wag" headlights (headlights that flash in an alternating manner), which are illegal under Washington law.

Officer Haner requested backup assistance, and pursued and stopped plaintiff on Highway 16. Officer Haner noted that the license plates on plaintiff's car were unreadable due to a dark-tinted license plate cover; a small amateur radio was installed with a microphone attached, with which plaintiff was monitoring Kitsap County Sheriff's Office communications; plaintiff had a portable police scanner on the seat next to him; and plaintiff told Haner he had handcuffs but that he did not have a gun in the car.

Officer Haner inquired about whether plaintiff had "wig-wag" headlights. Plaintiff told him that the headlights were not "wig-wag" lights but were part of

his alarm system. When the officer asked him to turn on the lights, plaintiff was unable to do so.

Officer Devenpeck arrived to assist Haner, and plaintiff was asked about the headlights. Plaintiff told them that the alarm system had just been installed that day and he did not know how to operate them. At some point during the discussions, Devenpeck noticed a shiny black object on the seat next to the driver's seat. He noticed that the device was a tape recorder with the play and record button depressed and apparently operating. When he rewound the tape, Devenpeck could hear that both his voice and plaintiff's voice had been recorded. In fact, the tape recorder had been operating since Haner had stopped the vehicle.

The facts diverge at this point. Plaintiff states that, when Devenpeck found the tape recorder, he immediately arrested plaintiff for illegal tape recording under RCW 9.73.030. Dkt. #39, Transcript of Plaintiff's Tape Recording, at 14. Devenpeck states that, before he arrested plaintiff, he called a Deputy Prosecutor for an informal legal opinion, and arrested plaintiff after he had received the legal advice. Dkt. #31, Exh. 2. Neither Devenpeck nor Haner's investigative reports refer to any consultation before plaintiff was arrested. Dkt. #39, Investigation Reports of Devenpeck and Haner.

Plaintiff informed the officers that he had been in a similar situation before with the Kitsap County Sheriff's Office, and that he had a copy of the applicable statute and a copy of *State v. Flores* [sic] in the car. He directed Devenpeck to the glove box

where these items were located. The officers did not follow up on plaintiff's offer.

While Devenpeck was inventorying the vehicle for impound, he located a switch under the steering column that appeared to be a "wig-wag" activation switch. He turned the switch on and the high beams of the headlights started flashing in an alternating manner. Plaintiff was cited for violation of RCW 46.37.280. He was taken to jail where he spent the night, and his car towed and impounded. The charges were later dismissed by the Pierce County District Court.

C. CLAIMS

Plaintiff claims defendants (1) arrested, filed false charges, and used excessive force against him in violation of the Fourteenth Amendment; (2) searched and seized him without probable cause and searched his vehicle without a warrant, in violation of the Fourth and Fourteenth Amendments; (3) incarcerated him without probable cause, in violation of the Fourteenth Amendment; (4) falsely arrested him without probable cause; and (5) falsely imprisoned him without probable cause. Dkt. #27, at 5-6.

D. STANDARD FOR STATING A CLAIM UNDER 42 U.S.C. § 1983

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United

States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

D.[sic] ISSUES

1. Are the claims against the Washington State Patrol and other named defendants sued in their official capacities barred on the basis of Eleventh Amendment immunity and/or for failure to name a person capable of being sued under 42 U.S.C. § 1983?

2. Should the claims against Annette Sandberg in her personal capacity be dismissed for failure to demonstrate personal participation?

3. Are defendants Devenpeck and Haner entitled to qualified immunity?

E.[sic] DISCUSSION

1. Claims against Washington State Patrol and Defendants Named in their Official Capacities.

Plaintiff has named the Washington State Patrol as well as individual defendants-Christine Gregoire, Annette Sandberg, Joi Haner and Gerald Devenpeck – in their official capacity.

Plaintiff's claims against the Washington State Patrol is barred by the Eleventh Amend-

ment. The Eleventh Amendment to the United States Constitution bars a person from suing a state in federal court without the state's consent. *See Seminole Tribe of Florida v. Florida,* 116 S. Ct. 1114, 1131 (1996); *Natural Resources Defense Council v. California Dep't of Transportation,* 96 F.3d 420, 421 (9th Cir. 1996). Eleventh Amendment immunity extends to state agencies. *Pennhurst State Sch. & Hosp. v. Holdeman,* 465 U.S. 89, 101-102 (1984). Eleventh Amendment immunity is not automatically waived in actions brought under 42 U.S.C. § 1983. *Quern v. Jordan,* 440 U.S. 332 (1979). Washington has not waived the protection of the Eleventh Amendment. *Edgar v. State,* 92 Wn.2d 217 (1979). The claim against the Washington State Patrol should be dismissed.

Plaintiff's claims against individuals in their official capacities are not cognizable in a civil rights action. Neither states nor state officials acting in their official capacities are persons for purposes of 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 48, 71 (1989). Because they are not persons within the meaning of § 1983, plaintiff has not stated a cause of action against any of the named individuals acting in their official capacities. The claims against Christine Gregoire should be dismissed. The claims against Annette Sandberg, Officer Devenpeck and Officer Haner in their official capacities should be dismissed.

2. Claims Against Annette Sandberg in Personal Capacity.

Plaintiff claims Annette Sandberg, Chief of the Washington State Patrol, in her individual capacity,

exhibited deliberate indifference when she failed to properly train, evaluate, and supervise police officers regarding their treatment of individuals, particularly in regard to the right of individuals to tape record actions of State patrol officers during stops, detentions, and arrests.

In order to state a claim under 42 U.S.C. § 1983, a plaintiff must set forth the specific factual bases upon which he claims each defendant is liable. *Aldabe v. Aldabe,* 616 F.2d 1089, 1092 (9th Cir. 1980). Vague and conclusory allegations of official participation in a civil rights violation are not sufficient to support a claim under § 1983. *Ivey v. Board of Regents,* 673 F.2d 266 (9th Cir. 1982). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 694 n.58 (1978); *Padway v. Palches,* 665 F.2d 965 (9th Cir. 1982). In this case, plaintiff has not pled facts sufficient to connect Sandberg with his arrest. His allegations regarding her failure to train, evaluate, and supervise officers are conclusory; he does not set forth any factual basis for the claims. In his response, plaintiff has not presented any factual argument regarding Sandberg's personal participation. The allegations against Annette Sandberg in her personal capacity should be dismissed.

3. Qualified Immunity of Officers Devenpeck and Haner.

Officers Devenpeck and Haner have also been sued in their individual/personal capacity. Defendants maintain officers Devenpeck and Haner

are entitled to qualified immunity because, at the time they made the stop and subsequent arrest, the law was not clearly established that individuals were permitted under the law to tape record police officers. In addition, defendants claim officer Devenpeck sought and acted upon legal advice after he discovered the tape recorder but before he arrested plaintiff for violation of RCW 9.73.030.

Defendants are entitled to qualified immunity from damages for civil liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official. *Id.* at 819.

In analyzing a qualified immunity defense, the Court must determine: (1) what right has been violated; (2) whether that right was so "clearly established" at the time of the incident that a reasonable officer would have been aware of its constitutionality; and (3) whether a reasonable public officer could have believed that the alleged conduct was lawful. *See Gabbert v. Conn*, 131 F.3d 793, 799 (9th Cir. 1997); *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996).

To be clearly established, the law must be sufficiently clear that a reasonable official would understand that his or her action violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The court should look to whatever decisional law is available to determine whether the law was clearly

established at the time the alleged acts occurred. *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985).

A. Constitutional Right Allegedly Violated.

Plaintiff claims the police in this case violated his Fourth and Fourteenth Amendments by arresting him without probable cause. The Fourth Amendment guarantees people the right to be free from unreasonable search and seizure. Police may arrest a person without a warrant if the arrest is supported by probable cause. *See United States v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989). Probable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime. *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992)(probable cause exists when "the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime." *United States v. Hoyos*, 892 F.2d at 1392. The question in this case is whether the police violated plaintiff's constitutional rights by arresting him without probable cause.

B. Clearly Established Right

If the law is not clearly established at the time of the alleged conduct, an officer would be entitled to qualified immunity. In this instance, the court must determine whether it was clearly established law at the time of the incident that an individual could not be arrested under RCW 9.73.030 for taping

conversations of police officers, given the circumstances of this case.

RCW 9.73.030 provides:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

In *State v. Flora*, 68 Wn. App. 802 (1992), Division I of the Washington Court of Appeals reversed a conviction after the defendant was convicted of violating RCW 9.73.030 by tape-recording the police officers who investigated and arrested him for violating a restraining order. The Court of Appeals concluded that the intent of this law is to protect individuals from the disclosure of any secret illegally uncovered by law enforcement, not to transform the privacy act into a sword available for use against public officers acting in their official capacity. *Flora*, 68 Wn. App. at 806-807. The court determined that whether a given matter is private requires a fact-specific inquiry, and in Flora's case, where the public officers were performing an

official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby, the officers did not have a privacy interest to assert under RCW 9.73.030. *Flora*, 68 Wn. App. at 807.

Defendant distinguishes this case from *Flora* in two respects: (1) there was no "third-party" present in this case, while Mr. Flora's friend was present when the tape recordings of the officers were being made; (2) plaintiff has not alleged that the conversation in this case took place on a public thoroughfare or that there was anyone within hearing distance. Those distinctions do not undercut the rule in *Flora*. The interaction here occurred on a highway. There is no principled reason for concluding that a highway is any less private than it would have been if the taping had occurred outside of plaintiff's house, as had happened in *Flora*. Whether a third party was present or not, the highway and its shoulder were certainly open and available to other people.

This incident in this case took place in 1997. *Flora* was decided in 1992. It appears that the law was clearly established in 1992 that RCW 9.73.030 would not prohibit taping of the police officers in a situation such as the present one. It was also clearly established that a person could not be criminally arrested or charged with violating RCW 9.73.030 for such conduct.

C. Reasonable Belief that Conduct was Lawful.

The officers in this case could still be entitled to qualified immunity in this case if they reasonably

believed their conduct was lawful. Officer Devenpeck maintains he called a deputy prosecutor and received legal advice upon which the officers acted in arresting plaintiff. Relying on the advice of an attorney may be a factor in considering whether an officer had a reasonable belief that the conduct was lawful. *See Watertown Equipment Co. v. Norwest Bank Watertown,* 830 F.2d 1487, 1495 (8th Cir. 1987). As noted above, the facts on this issue are in dispute. Plaintiff maintains the officers arrested him immediately after they discovered the tape records, and there is evidence to support that claim. Dkt. #39, investigative reports of officers Devenpeck and Haner, and transcript of tape recording. The court notes the deputy prosecutor is not identified nor is there an affidavit from any such prosecutor attesting to the facts in Officer Devenpeck's declaration. Because there exists an issue of fact on whether the officers reasonably believed their conduct was lawful, it is premature to grant qualified immunity to officers Devenpeck and Haner.

Therefore, it is hereby

ORDERED that Defendants' Motion for Summary judgment (Dkt. #35) is **GRANTED IN PART AND DENIED IN PART.** The Claims against the Washington State Police, Christine Gregoire, and Annette Sandberg are **DISMISSED WITH PREJUDICE.** The claims against Officers Joi Haner and Gerald Devenpeck in their official capacities are **DISMISSED WITH PREJUDICE.** Defendants' motion requesting the court to dismiss the claims against Officers Haner and Devenpeck in their individual or personal capacities on the basis of

qualified immunity is **DENIED WITHOUT PREJUDICE.**

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 29th day of November, 2000.

//s//
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL
Wednesday, January 3, 2001

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* * *

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rules and regulations of the State Patrol.

Q Do you review troopers – with respect to your supervisory responsibilities, do you review trooper's determination of probable cause?

A At the end of every month, the troopers submit all their case reports and all their monthly documentation to the supervisor for review. I closely reviewed their case reports to make sure they were complete and well-written and contained the facts and circumstances that were appropriate to the incident.

Q After you had your telephone conversation with Mark Lindquist, what did you do?

A I called Trooper Haner on the radio and told him that I had spoken with the prosecutor and that he agreed that the arrest was a good, valid arrest.

Q Did you discuss any other matters on the telephone with Mr. Lindquist?

A I don't recall specifically.

Q Any matters relating – any other matters than the Privacy Act, is what I mean. Other possible charges.

A As I recall, Mr. Lindquist said, "Well, it sounds like, based on the runaround the guy gave you, that you should charge him with obstructing." There's a statute for obstructing a public servant, which I can't quote the statute exactly, but if someone delays your investigation based on them not giving you proper information, that that's against the law.

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Now, a defendant doesn't have to make a statement, but if they are making statements to you that cause you to basically chase your tail, that's illegal, according to the statute. And he brought that up, and I said the State Patrol doesn't stack charges, which they don't.

Q What does that mean?

A That if you arrest someone for one reason, if there are other types of things – like I will resort back to a drunk driving case. If you stop an alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that's why you stopped them and you see that they are intoxicated, you don't normally write them a ticket for the stop sign violation.

Q Have you ever arrested somebody for one crime and they've been charged with a different one later?

MR. PHILLIPS: Object to relevance on this.

THE COURT: Sustained.

Q [BY MR. MENTZER] Why did you call Mark Lindquist instead of the on-call prosecutor?

A Mr. Lindquist was the prosecutor that worked at the district court in Gig Harbor, which was the court that we worked out of. I had worked with him on several prior cases, and in my, at that time – what, 18 or 19 years? – 18 or 19 years of experience at that time, he was the best prosecutor that I had ever worked with, and I have worked with many, many prosecutors.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL
Thursday, January 4, 2001

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* * *

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MR. PHILLIPS: Not from plaintiff, Your Honor.

MR. MENTZER: I have one.

THE COURT: Yes.

MR. MENTZER: The same one I made in chambers. I haven't yet numbered them. I will try to figure out which one it is.

14, if that is the one, Your Honor. It says, "It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not private under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of *State of Washington v. Flora*."

We take exception to that instruction with all due respect to the court. We know that was the ruling on our motion for summary judgment, but we believe the Washington Supreme Court in *State v. Clark*, 129 Wn.2d 211, is dispositive and

determinative of that factor. And the critical factor, we believe, is that there were passersby present, and that is what made the difference in *Flora*. In this case there were no passersby, and thus we believe that the *State v. Clark* stands for the proposition that the conversation was private and thus not lawful to record under the Privacy Act.

THE COURT: I appreciate your argument. It is my judgment, as I guess I'm not sure I had said on the record, but

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it's my judgment that the language of the Privacy Act itself requires that a conversation be private before there is a prohibition on one-party-consent recording. It seems to me ultimately clear and plain on the face of the statute, and also in the law that has interpreted it, that when a police officer is making a stop on a public highway that that is not a private conversation. Among other reasons is that everything that is said there is a matter of public interest and public inquiry, including in-court inquiry. There's nothing that can be said, in my view, by either – and this goes beyond this case, but I think there's nothing said under such circumstances by the one stopped or by the police officers that they can reasonably expect will be held private. It's a public officer doing public business with a citizen who is a member of the public, and the citizen should know from the circumstances, as the officers should know from the circumstances, that the conversations would not be expected to be

private. Certainly they would claim it wasn't private if there's a confession on the spot.

So, in any event, that's my view of that issue.

Okay. Are we ready to instruct the jury then?

MR. PHILLIPS: Yes, Your Honor.

MR. MENTZER: Yes, Your Honor.

THE COURT: All right.

[Jury present.]

THE COURT: Ladies and gentlemen, you heard before the

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last long recess here that both parties have rested, meaning they have presented all the evidence that they choose to present in the case, and so it is now time to instruct you on the law.

I told you earlier that you would be allowed to take notes during the presentation of evidence, but not at any other time. So now is the time for you to put your notes away. The only time you have taken notes is when there has been evidence presented to you, and I will ask you to not take further notes. You will be allowed to take those notebooks into the jury room with you.

I do want to just take a second to explain this process.

Jean is going to hand you copies of the instructions and verdict forms. I am going to read the instructions to you. You can read along with me, if you wish, or just listen. Some people have

better comprehension if they read along with a speaker; others find it better to just listen. Either way, it's up to you.

Those copies of the instructions are work copies for you and you can take those into the jury room with you. The original instructions that I read from and that bear my original signature are the instructions that will control your deliberations. If there are any differences between the original instructions and your copies, it's the original ones that control.

Now, I have already, in order to save time in typing, have

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made some interlineations in these instructions. I've just stricken some words out and initialed in the margin. The only reason for that is to save time. Any parts that I have stricken out are not part of the instructions. You are to disregard that.

Also you should be aware that sometime when I read instructions I find typographical errors that I overlooked before or something is wrong. If I do make any changes here in court that are not in your copies, I will let you know what they are as we go along.

But with that introduction, I will instruct you on the law.

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally

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important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return – that is a matter entirely up to you.

The evidence from which you are to decide what the facts are consists of: The sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness; and the exhibits which have been received into evidence.

Evidence may be direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence of nonexistence of other facts may be reasonably

inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and

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weight.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you

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find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

The plaintiff has two claims: One is a federal claim for violation of civil rights, and the second is a state claim for unlawful arrest and imprisonment.

You should decide the case of each defendant separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, the instructions apply to each defendant.

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional;

2. The defendant action under color of law; and

3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of

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proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendants' acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff was lawful and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof on a claim, your verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

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Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The court has found that the defendant acted under color of law.

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting

officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

In pertinent part, the Washington Privacy Act, RCW 9.73.030, provides: ". . . It shall be unlawful for any individual . . . to record any . . . private conversation, by any device . . . without first obtaining the consent of all the persons engaged in the conversation.

And further, section 3, Where consent of all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted; provided, that if the conversation is to be recorded that said announcement shall also be recorded.

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Violation of the Privacy Act is a gross misdemeanor.

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of *State of Washington v. Flora*.

A felony is a crime punishable by over one year in prison. A gross misdemeanor is a crime punishable by up to one year in jail.

A traffic infraction is punishable only by fine.

A police officer may detain a suspect for a limited period of time for investigation only if the officer has a reasonable suspicion, based on specific and articulable facts, that the person is engaged in criminal activity, or has committed a traffic infraction.

In determining whether the length of a detention of plaintiff before his arrest was reasonable, you should consider the nature of the criminal activity suspected, and whether the detention lasted no longer than necessary to confirm or deny that suspicion.

It is the duty of the court to instruct you on the measure of damages. By instructing – and I see a typographical error there I'm going to interline. The word "instruction" in the instruction on line 3 should be "instructing." Let me start

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again.

It is the duty of the court to instruct you on the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on plaintiff's claim, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a

preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

The nature and extent of the injuries.

The disability experienced.

The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

The reasonable value of earnings, earning capacity, and employment opportunities lost to the present time.

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

If you find that before this occurrence the plaintiff had a preexisting condition which made him more subject to injury than

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a person in normal health, and if you find that the condition was aggravated or made active because of the occurrence, you should consider all injuries or damages proximately caused by the occurrence even though those injuries may have been greater than those which would have been suffered by a person in normal health under the same circumstances. There may be no recovery,

however, for any results which would have normally followed from the preexisting condition had there been no occurrence as complained of in this case.

Only if you find for the plaintiff on plaintiff's federal claim, but you find that the plaintiff has failed to prove actual damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply

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because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest

belief about the weight and effect of the evidence simply to reach a verdict.

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the court that you have reached a verdict.

Now attached you will see work copies of the verdict forms. You will only use one verdict form in this case. Use verdict form A if you find for the plaintiff and against either or both defendants on either or both of plaintiff's claims. And if you use verdict form A, you will fill in that "We, the jury, find for the plaintiff and against defendants," and write in the name of any defendant that you find against, "and find plaintiff's damages to be," and there you would write in a number as indicated.

If you find for defendants and against plaintiff, you will use verdict form B only, and it simply reads, "We, the jury, find for both defendants and against plaintiff."

Now, let me say a couple of other things before we turn to argument.

There's a buzzer in the jury room that buzzes into chambers, so that after you start to deliberate on the case you should not

* * *

[Office of the Attorney General of Washington Letterhead]

May 28, 2003

Ms. Cathy Catterson, Clerk
Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1525

Re: *Alford v. Haner*, Ninth Circuit Cause No. 01-35141 / Citation to Supplemental Authorities.

Dear Ms. Catterson:

Pursuant to Federal Rule of Appellate Procedure 28(j), the Appellees bring the following pertinent and significant authority to the Court's attention.

Bingham v. City of Manhattan Beach, No. 01-56044, Filed May 19, 2003 (9th Cir.), pages 6593-6599; (Discussion that officers were entitled to qualified immunity for arrest of plaintiff when arrest is supported by probable cause for crime other than the crime for which plaintiff was arrested by officers).

This additional authority is a Ninth Circuit discussion of the issue this court asked the parties to be prepared to discuss at oral argument regarding the dicta of *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994) and supports Defendants'/ Appellees' argument that Defendants/Appellees were entitled to qualified immunity when the jury found that reasonable officers could have determined that

probable cause existed for crimes other than that for which Plaintiff/Appellant was originally arrested (discussed on pages 10-17 of Defendants'/Appellees' Corrected Brief). It is undisputed in this case that the officers considered the possibility of charging other crimes at the time of the arrest of Appellant. *See* Defendants'/Appellees' Corrected Brief pages 25-26.

Respectfully submitted,

//s//

Eric Mentzer, WSBA# 21243
Assistant Attorney General

cc: R. Stuart Phillips w/enc.

INSTRUCTION NO. 10
[U.S.D.C. W.D. Wash. Jury Instruction]

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional.

2. The defendant acted under color of law; and

3. The acts or omissions of this defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendant's acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff were lawful, and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff as the burden of proof on a claim, you verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

INSTRUCTION NO. 12
[U.S.D.C. W.D. Wash. Jury Instruction]

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

INSTRUCTION NO. 14
[U.S.D.C. W.D. Wash. Jury Instruction]

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of *State of Washington v. Flora.*

Ninth Circuit Mod[illegible] Civil Jury Instructions

11.3 QUALIFIED IMMUNITY

Comment

Qualified immunity is ordinarily a question of law for the court and should be decided at the earliest possible point in the litigation. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (reversing Ninth Circuit holding that qualified immunity was a question of fact for the jury). However, issues of fact may need to be determined by the trier of fact before the court can make a determination on qualified immunity. *See Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001); *Sloman v. Tadlock*, 21 F.3d 1462, 1467-68 (9th Cir. 1994) (noting that the question of whether the judge or jury should be the ultimate determiner of qualified immunity, once disputed foundational facts have been decided by the jury, is as yet unresolved); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993) (holding that qualified immunity becomes a jury question only where a genuine issue of fact exists preventing the determination of qualified immunity at summary judgment).

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Wash. Rev. Code.9.73.030.
Intercepting, recording, or divulging private communication– Consent required–Exceptions

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or

actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any

such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

Wash. Rev. Code 9A.60.040
Criminal impersonation

(1) A person is guilty of criminal impersonation in the first degree if the person:

(a) Assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose; or

(b) Pretends to be a representative of some person or organization or a public servant and does an act in his or her pretended capacity with intent to defraud another or for any other unlawful purpose.

(2) Criminal impersonation in the first degree is a gross misdemeanor.

(3) A person is guilty of criminal impersonation in the second degree if the person:

(a) Claims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer; and

(b) Under circumstances not amounting to criminal impersonation in the first degree, does an act with intent to convey the impression that he or she is acting in an official capacity and a reasonable person

would believe the person is a law enforcement officer.

(4) Criminal impersonation in the second degree is a misdemeanor.

Wash. Rev. Code 9A.76.020
Obstructing a law enforcement officer

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.